The Jurisprudence of Lord Denning
A Study in Legal History
Volume I:
Fiat Justitia: Lord Denning and the Common Law

The Jurisprudence of Lord Denning
A Study in Legal History
Volume I:
Fiat Justitia: Lord Denning and the Common Law

By

Charles Stephens

CAMBRIDGE SCHOLARS

PUBLISHING

The Jurisprudence of Lord Denning:
A Study in Legal History
Volume I:
Fiat Justitia: Lord Denning and the Common Law, by Charles Stephens

This book first published 2009

Cambridge Scholars Publishing

12 Back Chapman Street, Newcastle upon Tyne, NE6 2XX, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN (10): 1-4438-1244-7, ISBN (13): 978-1-4438-1244-3

As a three volume set: ISBN (10): 1-4438-1252-8, ISBN (13): 978-1-4438-1252-8

> There comes a time in peace and war, as recent events show, when a stand must be made on principle, whatever the consequences. Such a stand should be made here today.

Cheall v Association of Professional, Executive, Clerical and Computer Staff
1982 3 AllER 855 at 881

Judgment by Lord Denning delivered on June 18th 1982
On April 2nd 1982 Argentina invaded the Falkland Islands.
On June 14th the Argentine garrison in Port Stanley surrendered.

> During this stay [in Plymouth] in August 1982 there was a thrill. Two of the frigates came home from the Falklands. One with a hole right through her hull by an Exocet. Fortunately above the waterline. With our luncheon guests we joined in the welcome. We had a large Union Jack flying from the window. We cheered and cheered. My own nephew, Norman's son, had been in the campaign with the Royal Navy. Once more the words of Shakespeare came to mind:
>
> 'This England never did, nor never shall,
> Lie at the foot of a proud conqueror,
> But when at first did help to wound itself.
> Now these her princes are come home again;
> Come the three corners of the world in arms,
> And we shall shock them: Nought shall make us rue,
> If England to herself do rest but true'.
> I thought to myself: In peace, as in war, we must rest but true.

—Lord Denning *The Closing Chapter* [1983] pp. 22-23

TABLE OF CONTENTS

FOREWORD

I dedicate my work on Lord Denning, which is also a contribution to the study of English identity and the nature of English history, to three friends: Nirad C. Chaudhuri, Hamish Henderson and Michael Stenton.

In Oxford, during the winter of 1975-6 Mr Chaudhuri, or Nirad Babu as he should properly be called, the author of *The Autobiography of an Unknown Indian*, *A Passage to England* and *Thy Hand Great Anarch*, introduced me to the tragic history of the Bengali nation. In so doing, he reminded me that great nations can die, as well as be born and flourish. Like Lord Denning, Mr Chaudhuri lived to be 100.

In 1977, and over the following years until his death in 2002, Hamish Henderson shared his love of the Scottish nation with me and taught me to respect and honour that people. Hamish, a great poet, author of *Freedom Come All Ye* and the translator of Antonio Gramsci, was a 'man of the Left' but he was amused and touched by the fact that one of his poems appeared on the same double facing page as one of those written by Enoch Powell in an anthology of war poems entitled *The Terrible Rain: The War Poets 1939-1945*, edited by Brian Gardner and published by Methuen in 1966. The other poem on that double facing page was written by Frank Thompson, the brother of E.P. Thompson, author of *The Making of the English Working Class*; Frank Thompson was executed by agents of Stalin in Bulgaria in 1944. Enoch Powell retained the friendship of Michael Foot throughout his life; Tony Benn attended his memorial service. Serious students of the proper history of nations are not concerned with 'Left' or 'Right', designations emanating from the French revolutionary entity and progenitor of the 'Terror' known as the National Convention, but with piety, patriotism and loyalty; perennial virtues which were known to Herodotus and Thucydides as well at to Livy and Tacitus.

Between 1991 and 1997, in Cambridge, Michael Stenton and I taught students from the United States, Japan, Germany, France, Russia, Denmark and many other nations about the nature of English national identity. During those hot July and August days, when the Treaty of Maastricht was debated, turbulently, in Parliament, and the Conservative government slowly declined into sad incoherence and abject disgrace, Michael, a member of Peterhouse, instructed me in the continuities and

complexities of English history. This work was conceived, if not completed, during that period.

The German philosopher G.W.F. Hegel observed that “wenn die Philosophie ihr Grau in Grau malt, dann ist eine Gestalt des Lebens alt geworden, und mit Grau in Grau läßt sie sich nicht verjüngen, sondern nur erkennen; die Eule der Minerva beginnt erst mit der einbrechenden Dämmerung ihren Flug“ [*Grundlinien der Philosophie des Rechts* [1821] Vorrede]. It may be that the long story of England has not yet entered its *dämmerung* but, whether or whenever that eventuality may come to pass Lord Denning will surely have an honoured place amongst the wisest of its many worthies.

ACKNOWLEDGEMENTS

My wife Karin has been unfailingly supportive and optimistic. In 1998, she gave me a copy of Lord Denning's *The Family Story* for my birthday; it has proved to be an indispensable *vade mecum* and a valued *enchiridion*. I have heard it said that lawyers who use too much Latin are probably practiced deceivers and we all know that we must be on guard against Greeks bearing gifts; perhaps those who attend to the wisdom of both Rome and Greece, listening to both, but deferring to neither, are protected from the perils of fraudulent misrepresentation and sudden assault. My students at Birkbeck College, the Open University and Queen's College in Harley Street enabled me to retain a sense of proportion and to realise that my lucubrations about Lord Denning, the Law and the nature of English identity had points of contact with the quotidian world.

I am also beholden to Professor Patrick Hanafin and Dr. Piyel Haldar. Along with their colleagues at Birkbeck College's Department of Law, they guided me, with a 'kindly light', through the rebarbative thickets of 'critical legal theory'; a practice which might, by its detractors, be aptly named 'foul smelling and loathsome', as Peter Goodrich, one of its notable practitioners once described the common law. This experience provided me with a metaphorical, but indispensable, grindstone on which I sharpened the blade of my delight in the traditional patriotic verities espoused by Lord Denning whose portrait presides, in what must often be baffled perplexity, over the varied proceedings which take place in the Council Room of Birkbeck College.

Professor Gary Slapper has provided me with support and encouragement. We share a common affection for the work of the late Peter Cook. In the course of swapping favourite Peter Cook sketches by means of YouTube, I was reminded of the ways in which the lives of Peter Cook and Lord Denning were intertwined, not least in the case of *Goldsmith v Sperrings Ltd* in 1977. Like a white knight, Lord Denning came to the aid of *Private Eye* when that noble vehicle of true journalistic endeavour faced a grim nemesis in the form of Sir Jams Fishpaste. Lord Denning often joked that he possessed 'every Christian virtue, except resignation'. I recall, from the early 1980s, a cartoon in *Private Eye* which made use of this phrase to good effect. I feel that Lord Denning was the only judge of whom *Private Eye* might have approved. He was not quite

Mr Justice Cocklecarrot, once memorably played by Clive Dunn, but I feel that he could have been depicted on the stage by an actor made up from bits and pieces of all of those who entertained us in *Dad's Army*, except perhaps for the very Scottish John Laurie. H.E. Bates, like Lord Denning, a lover of Kent and of the kinder aspects of the English character, could have written the script. 'Pop' Larkin would have certainly been an attractive litigant in Lord Denning's eyes and I am quite certain that, just as Mandy Rice Davies thought him 'the nicest judge I have ever met', so Mariette and Primrose Larkin would have reminded him of the days when 'it was bluebell time in Kent'.

I owe a particular debt of gratitude to Professor Tony Lentin. We first met as trainee tutors for the Open University's pioneering foundation course in Law: *Rules, Rights and Justice: An Introduction to Law*. We were introduced to each other by Professor Gary Slapper as fellow historians. A facile comment by another trainee tutor about Lord Denning's 'racism' drew us together in shared indignation. I was already engrossed in the research on which this study of Lord Denning's jurisprudence is based. We spent the evening in pleasant discussion of Lord Denning, Lloyd-George, Lord Sumner and many other congenial matters. Professor Lentin shares my profound admiration for Lord Denning and has provided me with the support and encouragement which has enabled me to maintain the enthusiasm and determination necessary to bring my work to a successful conclusion. Unlike Professor Lentin, who corresponded with him and watched him in court, I never met Lord Denning, knowing him only from my study of the Law. On the final page of his biography of Lord Sumner, a very different, but equally great judge, Professor Lentin wrote these words:

> As an honorary Fellow of Magdalen and a frequent visitor to Oxford, Sumner often dined in College. On one such occasion in the early 1920s, a shy young law student was ushered into his presence. 'I was invited into the Senior Common Room to meet him. Even on that short occasion, I felt that he was a rather formidable character. He looked stern. He did not have an easy manner with young people like me'. The young student was the future Lord Denning, [Lentin, A. *The Last Political Law Lord: Lord Sumner [1859-1934]* Cambridge Scholars Publishing 2008 p. 258]

As I was growing up and coming to know the world, I always felt reassured by Lord Denning's presence in our national life. At the back of my mind I felt that we were all safe as long as he was Master of the Rolls. The origins of this project lie in those memories. In 1998, I started an LLB at Birkbeck College, of which Lord Denning had been President between

1953 and 1983. My first steps in the Law were taken while he was still alive and, though I never met him in person, there was not a week in which I did not look with affection at his portrait in the Council Room of Birkbeck College. Lord Denning is therefore the other person to whom I owe a debt of gratitude. It might seem a banal comment but without the particular warmth and humanity of his presence I should never have been able to spend nearly ten years of my life preparing this work which is dedicated to the preservation of his memory.

INTRODUCTION

LORD DENNING IN THE EYES OF HIS CONTEMPORARIES

The English common law tradition, as defended by Fortescue, Coke and Blackstone insisted, following the maxim of Bracton - *ipse autem Rex, non debet esse sub homine, sed sub Deo et lege, quia lex facit regem*[1] - that the law was the supreme authority in England. Fortescue, Coke and Blackstone rejected the civilian notion, as expressed in the maxim - *quod principi placuit vigorem legis habet*[2] - that the will of the Prince was superior to the law. One of the paradoxes of the way in which the English political system has developed since Henry VIII used the sovereignty of parliament to disrupt the relationship between the England and the Roman Catholic Church, is that the maxim *quod principi placuit vigorem legis habet*, as expressed in the will of a sovereign parliament, has increasingly come to overshadow the principle that the law rather than the will of the Prince, or of a sovereign parliament, is the supreme authority in the land.[3] One of the most important issues in contemporary British politics is whether the will of parliament, or the rule of law, should prevail[4].

Lord Denning[5] was an articulate and vehement defender of the common law tradition as found in the writings of Fortescue, Coke and Blackstone. In his understanding of the common law tradition, law, as interpreted by the judges, rather than the will of a sovereign parliament, was the supreme authority in the realm. In the quarter of a century which has passed since his retirement,[6] the jurisprudence of Lord Denning has attracted a considerable body of legal scholarship. The following account of Denning's career, provided on the eponymous *Denning Law Journal*'s website,[7] is indicative of the view of his career and its significance taken by a considerable number of judges, lawyers and members of the public:

> He became well known for his judgments, which frequently pushed the law in novel directions. Even in his early career his decision in the now world renowned High Trees case: *Central London Property Trust Ltd v. High Trees House Ltd* [8] brought him into the forefront of judicial reasoning for his innovative approach to legal reasoning when he developed the principle

> of equitable *estoppel* or *promissory estoppel* as applied to contract law. Denning spent twenty years as the Master of the Rolls, presiding over the Civil Division of the Court of Appeal, after five years as a Law Lord, shifting to the Court of Appeal at his request because he was happier with that post than one in the more senior court. Court of Appeal judges sit in threes, and the Lords in fives (or more), so it was suggested that to get his way in the Court of Appeal Denning only had to persuade one other judge whereas in the House of Lords it was at least two. The other 'benefit' of the Court of Appeal is that it hears more cases than the House of Lords, and so has a greater effect on the law. During his 20 years as Master of the Rolls, he could choose both which cases he heard, and the judges with whom he sat. Therefore, on most issues, he effectively had the last word; not many cases went on to the House of Lords, Britain's highest court of law. Many of Denning's efforts to change the law were vindicated by the passage of time (and legislation) — in particular, his efforts to establish an abandoned wives' equity, small print exemption clauses, inequality of bargaining power, negligent misstatement, liability of public authorities, and contractual interpretation.[9]

Lord Denning's work in reforming the common law so that it provided protection for the 'small man', the consumer, the abandoned wife, the worthy subject of the legal order, was clearly of cardinal importance to the editors of, and contributors to, the *Denning Law Journal*. The aims of the *Journal*, set out on its website, provide further insight into the reasons why its editors and contributors valued Lord Denning's jurisprudence:

> The aim is to provide a forum for the widest discussion of issues arising in the common law…..[these issues included]: the importance of developing the common law, the need for judicial and community recognition of the importance and urgency of reform and modernization of law, the importance of preserving the traditions of judicial independence, integrity and creativity, the importance of reflecting upon the interplay between law and morality, the essential role to be played by the law in the defence of the individual in the modern state'.[10]

It is clear that the editors and contributors of the *Denning Law Journal* considered that these themes were exemplified by the career of Lord Denning and were crucial to his contribution to the law. The themes of modernisation of the law, the relationship between law and morality, the independence of the judiciary and the protection of the rights of the individual, were explored in the celebratory edition of the *Denning Law Journal* published on the occasion of his 100th birthday in 1999.[11]

Two biographies, by Iris Freeman[12] and Edmund Heward,[13] based on interviews and secondary material, dealt with the outlines of Denning's

career. In his review[14] of *Lord Denning: A Biography* by Edmund Heward, Tim Murphy commented: 'This is a peculiar book. In part it consists of that increasingly familiar genre of 'Denning's contribution to the development of the law'. Other parts consist of snippets from Denning's personal life, culled from a combination of Denning's autobiography and anecdotes and correspondence from admirers, friends and relatives'. Murphy noted the 'hagiographical tone which largely dominates throughout' and 'that Denning's wider reputation has been somewhat eclipsed' since his retirement in 1982. Murphy concluded that a 'biography of this kind – largely hagiographical in intent and construction – tells us very little, in the end, about the 'man', beyond the rather bland recycling of the mythology with which we are already familiar'.

In 1977, J.A.G. Griffith[15] published *The Politics of the Judiciary*.[16] Although Griffith's argument was concerned with the judiciary in general, much of what he had to say had relevance to a consideration of the jurisprudence of Lord Denning. Griffith's approach to the analysis of 'the politics of the judiciary' provided a framework within which Lord Denning's critics could subject his judgments to a critique which contrasted strongly with the hagiographical approach which Murphy had noted as being typical of the response to Lord Denning's jurisprudence.[17] Griffith maintained that the judges 'cannot be politically neutral because they are placed in positions where they are required to make political choices which are sometimes presented to them, and often presented by them, as determinations of where the public interest lies; that their interpretation of what is in the public interest and therefore politically desirable is determined by the kind of people they are and the position they hold in our society; that this position is part of established authority and so is necessarily conservative, not liberal'.[18]

Griffith argued that 'judges are the product of a class and have the characteristics of that class. Typically coming from middle-class professional families, independent schools, Oxford or Cambridge, they spend twenty-five years in successful practice at the Bar, mostly in London, earning very considerable incomes by the time they reach their forties. This is not the stuff of which reformers are made, still less radicals.....unorthodoxy in political opinion is a certain disqualification for appointment'.[19] Griffith maintained:

> Judges are concerned to preserve and protect the existing order. This does not mean that no judges are capable of moving with the times, of adjusting to changed circumstances. But their function in society is to do so belatedly. Law and order, the established distribution of power both public and private, the conventional and agreed view amongst those who exercise

> political power, the fears and prejudices of the middle and upper classes, these are the forces which the judges are expected to uphold and do uphold.[20]

'The principal function of the judiciary,' concluded Griffith, 'is to support the institutions of government as established by law. To expect a judge to advocate radical change is absurd. The confusion arises when it is pretended that judges are somehow neutral in the conflicts between those who challenge existing institutions and those who control those institutions'.[21] 'Your assessment of Lord Denning as a judge,' Griffith considered, 'will depend on whether you like his highly subjective view of justice. And the likelihood is that you will like his prejudices when they match your own…..his view of justice is too personal, too idiosyncratic, too lacking in principle for greatness'.[22]

Griffith considered that it was political debate and, if necessary, conflict, the resolution of differences by means of democratic process, that should lead to change in the law, not the actions of judges. Democratic politics, rather than judicial intervention, should be the means by which the law was reformed and liberty guaranteed. Griffith concluded that:

> Our freedoms depend on the willingness of the press, politicians and others to publicise the breach of these freedoms, and on the continuing vulnerability of ministers, civil servants, the police, other public officials and powerful private interests to accusations that these freedoms are being infringed. In other words, we depend far more on the political climate and on the vigilance of those members of society who for a variety of reasons, some political and some humanitarian, make it their business to seek to hold public authorities within their proper limits. That those limits are also prescribed by law and that judges may be asked to maintain them is not without significance. But the judges are not....the strong, natural defenders of liberty.[23]

In 1981, two Scottish legal academics, Peter Robson and Paul Watchman, edited a collection of essays which considered Lord Denning's jurisprudence within the framework of the critique of the judiciary established by J.A.G. Griffith.[24] In the introduction to this collection of essays, the editors declared their aim:

> In this work some sceptical academic lawyers, Scots most of them or working in the astringent air of Scotland, pose like Hans Christian Andersen's embarrassing child, the awkward question, does this judicial monarch wear any conceptual clothes? Are his judgments based on anything more than hunch, whim or even prejudice and thus an affront to

> true law, which forms a cohesive system, is consistent in its application and so predictable in its future effects? Is the justice which he so often invokes as his guiding-light amid the encircling gloom of bad precedents not a fitful and wayward torch? And how can this brazen judicial law-making be reconciled with the assumptions of parliamentary democracy.[25]

Operating within the framework established by Griffith, combined with - given their Scottish provenance - particular regard for the civilian approach to law which considered that law should 'form a cohesive system….consistent in its application and so predictable in its future effects', Robson, Watchman and their fellow contributors were sceptical about the role of Lord Denning in modernising and reforming the law, achievements admired by those who attended the conference at the University of Buckingham on the occasion of his 100th birthday. Focusing on Denning's approach to sexual morality, national security, medical negligence and clinical judgment, the homeless and the trade unions, the contributors argued that his jurisprudence posed 'a real threat to the rule of law and the social democratic process'. The contributors to this collection of essays adopted a highly critical attitude to what they perceived to be the reactionary, undemocratic, arbitrary and decidedly idiosyncratic nature of Denning's jurisprudence. Attentive to the way in which the media portrayed Lord Denning, Watchman noted that he had become a 'sacred object of reverence like the Royal Family'.[26]

The negative assessment of the jurisprudence of Lord Denning adopted by Griffith, and the contributors to the volume edited by Robson and Watchman, was at odds with the laudatory regard paid to him by those who attended the conference at the University of Buckingham. Contemporary attitudes towards Lord Denning tended towards one or the other of these two approaches; that of those such as Griffith who tended to be sceptical, even suspicious, of his contribution to the law and that of those, such as the editors and contributors to the *Denning Law Journal* who applauded his role as a reformer and modernizer of the law, champion of the rights of the individual and defender of the independence of the judiciary who sustained the link between the law and morality.

Lord Denning: the Judge and the Law, edited by McAuslan, P. and Jowell, J.[27] was a broad general survey of Denning's contribution to the law in which a number of scholars examined his influence over the development of the law in a series of essays which ranged broadly over the fields of contract and tort, equity and trusts, family law, land, planning and housing law, administrative law, human rights and labour law. In his review of this volume,[28] Lord Wilberforce[29] noted that Lord Denning's contribution to tort and contract was considered 'outstanding and generally

uncontroversial', that his contribution to equity and trusts was 'not a field which [he] had made his own', and that, although he had made a significant contribution to administrative law, outlining a strategy for its development as early as 1949 in his Hamlyn Lectures[30] of that year, the contributions of 'Lord Reid, Lord Diplock, Lord Goddard and Professor Wade' deserved equal, if not more credit.

According to Lord Wilberforce, Denning's contribution to family law was marred by 'contradictions and inconsistencies', although it attempted to provide 'a rudimentary form of justice designed for the protection of the weak' at a time when the law was in 'a primeval state of shifting uncertainty' as a result of the fact that 'old values had broken down'. With regard to labour law, Lord Wilberforce remarked that this area of law had been subjected to a 'see-saw of legislation of high political motivation' and that any Court of Appeal 'in these circumstances, must have found it difficult in the extreme to produce a coherent body of law'. Lord Wilberforce noted that Lord Denning favoured 'laissez-faire anti-collectivism' and that, with regard to the law of individual employment, he adopted an idiosyncratic approach based on a personal set of values.

Commenting on Denning's approach to human rights and civil liberties, Lord Wilberforce stated that his judgments provided the 'strongest possible argument against a politically non-responsible judiciary and against investing judicial decisions with the finality that follows from a Bill of Rights'. He noted that Lord Denning had adopted an authoritarian approach to the rights of squatters, the homeless, prisoners, immigrants, aliens seeking to avoid deportation and, in particular, national security. He also noted that his judgments were disfigured by an 'infuriating paternalism' with regard to women, and 'economic illiteracy'. However, without Lord Denning's 'fertility of mind', the 'deserted wife's equity', the theories of 'license' and the 'constructive trust' would have been lacking in the law. Lord Wilberforce also noted Denning's positive contribution to the development of *locus standi*, effective legal remedies against public authorities, the individual right to work, consumer rights and, with reservations, freedom of expression.

Lord Wilberforce noted that *Lord Denning: the Judge and the Law* did not include any consideration of Denning's notable contribution to commercial law, in particular the development of the *Mareva* and *Anton Piller* injunctions, nor to his splendidly lucid judgments with regard to 'dividend stripping', private international law and state liability in respect of commercial contracts. Lord Wilberforce also noted the lack of discussion of Lord Denning's remarkable influence over his colleagues, in particular his encouragement of them to look positively on a 'more liberal

and constructive approach' to the judicial task. Although Lord Wilberforce was sharply critical of Lord Denning's 'disruptive' tendency to reverse, in the name of 'justice', precedents and legal principles which his colleagues on the bench had followed loyally, he noted that his 'virtuosity' was valuable in the handling of every day cases, especially 'with litigants in person or young counsel' and that he knew of 'no story of discourteous or even rough handling on his part from the Bar'. Overall, Lord Wilberforce considered Lord Denning to have been 'a great man and a great judge'.

In his entry in the *Oxford Dictionary of National Biography*, Lord Goff[31] concentrated on Lord Denning's contribution to the law in the 1940s and 1950s, making little reference to his work in the Court of Appeal as Master of the Rolls.[32] Lord Goff noted that one of Denning's first major contributions to the law was his reversal of the burden of proof with regard to pension appeals. Appointed Judge for Pension Appeals in 1946, Lord Denning, in a 'courageous' and 'bold' move, formulated the rule that if a man was fit when he joined the armed forces but was later discharged on medical grounds there would be a presumption that his disability was caused by his war service. He also allowed appeals 'out of time' thereby doing justice to those who had served the nation in time of war.

Lord Goff commented that Lord Denning had little influence in the House of Lords,[33] where he was only one voice out of five, and that he had no success in persuading Lord Simonds that precedent should be manipulated, or even ignored, in order to achieve a just result. Lord Goff noted that Lord Simonds administered a crushing, and 'uncalled for', public rebuke to Lord Denning; completely dissociating himself from a judgment[34] concerning sovereign immunity with regard to commercial transactions, which later led to a major development in the law.[35] Lord Simonds strongly objected to the fact that Lord Denning had based his judgment on arguments and cases cited neither in argument nor in the judgment of the lower court.

Lord Goff then reviewed what he regarded as Denning's important contributions to the law: equitable *estoppel*,[36] compensation for negligent misstatement,[37] the control of the abuse of power,[38] the purposive approach to the construction of documents[39] and to the construction of a contract,[40] the deserted wife's equity,[41] *saisie conservatoire*,[42] the reception of European law[43] and restitution.[44] It is noticeable that the great majority of these judgments dated from before the period in which Lord Denning was Master of the Rolls, suggesting strongly that Lord Goff thought more highly of the way in which he developed the law during the 1940s and 1950s, than during the later period of his career.

Lord Goff concluded that Denning had developed the common law in 'an acceptable manner to achieve practical justice' and that he 'decided individual cases simply on the merits as he saw them, without troubling too much about settled legal principle which might point in another direction'. Lord Denning had 'an evident determination to protect the little man from overbearing authority' and considered that the duty of a judge was 'not merely to apply the law but to do justice'. Whereas judges in the first part of the twentieth century 'regarded it as an abuse of judicial power to change the law', considering that parliament alone could undertake such a task, Lord Denning took a different view and 'practical justice has been the beneficiary'.

In his obituary of Lord Denning, *A Benchmark of British Justice*,[45] Lord Justice Stephen Sedley[46] provided a somewhat more critical, and penetrating, assessment of Denning's career. Sedley noted that Lord Denning was 'one – perhaps the last – of a sparse succession of major judicial figures who have succeeded in shaping areas of the law into conformity with a strongly held world view'. He remarked that Lord Denning's 'most abiding and probably least deserved reputation was as a liberal', noting that he had a 'conservative set of personal and public values'.

Sedley commented that Lord Denning's famous decision in *High Trees*, based on the equitable doctrine of promissory *estoppel*, established the elementary moral test of holding people to their promises – 'something which the commercially oriented common law had found it expedient not to do'. Sedley considered that Lord Denning's decisions - which protected the 'deserted wife's right to salvage a home from the ruins of a marriage' and established 'the liability of advisers for negligent advice' - enabled the common law to escape from 'entrenched and indefensible moral positions'. Lord Denning, Sedley noted, had 'the scholarship, the courage, and the sense of opportunity to restore the credit of the common law when the chance came his way'. He clearly approved of the way in which Lord Denning had redeemed the common law from an overly rigid adherence to technical rules relating to consideration, property rights and the scope of tortious liability, the consequence of which, in Sedley's opinion, had been a cynical disregard for substantive morality.

However, Sedley also noted that Lord Denning had a 'distaste for interference with individual enterprise' and exhibited 'paternalistic, sometimes simplistic, views on social questions'. A strong proponent of the 'right to work', Lord Denning followed Coke's dictum that 'at the common law no man can be prohibited from working at any lawful trade, for the law abhors idleness'.[47] Sedley noted that Coke's sentiment that 'the

law abhors idleness' was followed absolutely literally by Lord Denning who remarked, in *Langston v Amalgamated Union of Engineering Workers*:[48] 'rather than sit idly at home waiting for her husband to return [a woman should work]…..the devil tempts those who have nothing to do'. Such an attitude towards 'the right to work', Sedley observed, not only revealed an inappropriately paternalistic attitude towards women but would also entail hostility towards the role of trade unions, in particular with regard to collective bargaining and towards their adherence to an ethic of solidarity, which was often at odds with the individual freedom of their members. Sedley further noted that Lord Denning's approach to 'the right to work' would also lead to warm endorsement of individual enterprise and economic freedom, values consistent with the neo-liberal economic reforms which inspired the policies of the governments of Margaret Thatcher.

Sedley argued that Lord Denning was 'complex in his strategic views and in many ways a vigorous modernist'. In his view, Denning had not only redeemed the common law from an overly rigid adherence to technical rules but had also helped to re-establish the principle of judicial review of local and central government[49] and developed the doctrine of 'legitimate expectation'.[50] However, he had also 'abdicated in favour of an uncontrollable executive' when it came to reviewing a decision taken on the basis of 'national security',[51] and exhibited a 'strongly authoritarian approach to public affairs, marked by a rigorous view of private morality and a patrician attitude to individuals'.[52] Despite this less than attractive attitude, Lord Denning had given a notable dissenting judgment 'giving priority to the right of peaceful civic demonstration over the rights of estate agents and property speculators',[53] and had welcomed the legal implications of Britain's adhesion of the European Community.[54]

Sedley concluded that Lord Denning's approach to the law was typified by a 'radical conservatism' commenting that 'the emergence of just this as the dominant mode of the political state during [his] later years was perhaps an index of his prescience and a confirmation of his status, not merely as a judge, but as a historic figure of enduring importance'.

The approach to Lord Denning's jurisprudence adopted by his contemporaries, as outlined, emphasised on the one hand his role as a modernizer of the law, concerned to protect the individual from abuse of power and to defend his rights and freedoms, sustaining the association between law and morality; and on the other took up a sharply critical view of his tendency to support conservative, old-fashioned values and of his arbitrary use of judicial authority to develop the law in politically controversial directions based - in the view of his critics - on idiosyncratic

and inappropriate values.

The argument which follows will provide an interpretation of the jurisprudence of Lord Denning set in the context of the common law tradition as established in the writings of Sir John Fortescue, Sir Edward Coke and Sir William Blackstone. The next chapter will examine the relationship between the jurisprudence of Lord Denning and the common law tradition by evaluating his understanding of two principles of that tradition as understood by Fortescue, Coke and Blackstone: the supremacy of law over all other forms of authority in the state; and the decisive role of the judiciary in interpreting and developing the meaning of law. The following chapter will consider his understanding of the peculiarity of the English common law by examining his interpretation of its 'immemorial' and nostalgic quality, and also of its nature as a garden and as an inheritance, themes prominent in the delineation of the English common law tradition found in the writings of Fortescue, Coke and Blackstone.

The main body of this study consists of three chapters in which Lord Denning's understanding of the role of the judge and the nature of judicial discretion is evaluated by means of an analysis of the way in which he revealed his attitude to the role of the judge, and the nature and scope of judicial discretion, in the rhetoric and reasoning of the judgments which he handed down in the Court of Appeal between 1962 and 1982, and also in his published writings. It could be argued that the decisive role of the judge as the authoritative interpreter of the law was the keystone of the common law tradition as understood by Fortescue, Coke and Blackstone. It follows that Lord Denning's understanding of role of judicial discretion in moulding and shaping the common law was a crucial aspect of his transmission and development of that tradition.

The first of these chapters will consider Lord Denning's conception of the nature of judicial discretion. This chapter sets out an assessement of his understanding of the role of judicial discretion in the common law tradition, in particular in relation to the doctrines of precedent and statutory interpretation. The following chapters consist of an examination of the way in which Lord Denning used judicial discretion to protect the rights of the individual and to control the abuse of power by overmighty subjects, such as the trade unions, and to regulate the exercise of power by local government officials and ministers of the Crown. The study concludes by setting Lord Denning's jurisprudence in the context of contemporary legal developments.

Notes

[1] 'For the King himself ought to be under no man, but under God and the Law, for it is the Law that makes him King'.

[2] 'What pleases the Prince has the force of law'.

[3] For a discussion of the role of the sovereignty of parliament in the English polity see Goldsworthy, J. *The Sovereignty of Parliament* [Oxford 1999]. Goldsworthy argues that sovereignty of parliament had become the fundamental principle of the English polity long before the reign of Henry VIII, a view which is not compatible with the vision of the common law tradition set out in the writings of Fortescue, Coke and Blackstone.

[4] For a vigorous assertion of the argument that the polity of the United Kingdom rests on the twin pillars of parliamentary sovereignty and the law as interpreted and protected by the judiciary see Allen, T.R.S. *Constitutional Justice: A Liberal Theory of the Rule of Law* [2001 Oxford: Clarendon Press] and *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* [1993 Oxford: Oxford University Press]. For a judicial contribution to this debate see Sedley, S., 'The Sound of Silence: Constitutional Law without a Constitution', 110 Law Quarterly Review 1994, 273. One of the implications of the position adopted by Allen and Sedley is that, at some point in the future, a direct clash between the sovereignty of parliament and the judiciary is possible. Allen argues persuasively that an Act of Parliament which subverted basic principles of human rights or democracy would not be enforced by the judiciary. Such an eventuality has not occurred, indeed may never occur, but were it to do so then the outcome would be very uncertain indeed. The erosion of the authority of the law, as interpreted by the judiciary, by an increasingly aggressive Parliament wielding the power of sovereignty, threatens the integrity of the English legal system. Lord Bingham, the current Senior Law Lord, has remarked as follows: 'When I started in practice, it was an almost universal article of faith that English law and its institutions, were without peer in the world….an unquestioning belief in the superiority of the common law and its institutions', Bingham T., 'There is a World Elsewhere': The Changing Perspective of English Law' International and Comparative Law Quarterly Vol. 41 No. 3 [July 1992] pp. 513 – 529 at 514. It is doubtful if such a claim could be made by a lawyer starting his or her career today. The abuse of parliamentary sovereignty by a corrupt and unaccountable House of Commons, abetted all too frequently by a House of Lords packed with placemen, is one of the reasons for this disturbing deterioration in the condition of England.

[5] 'Denning is certainly the most interesting and possibly the most important English judge of the twentieth century'. Stevens, R. *Law and Politics: The House of Lords as a Judicial Body 1800-1976* [1979] p.488. Stevens also suggested that Lord Denning was one of the 'few English judges who clearly merits an extensive intellectual biography'. Ibid p.496. Quoted in Klinck, D.R., ''This Other Eden': Lord Denning's Pastoral Vision'' Oxford Journal of Legal Studies [1994] Vol. 14 No. 1 at p. 25

[6] Lord Denning retired on September 29th 1982.

[7] Lord Denning was an enthusiastic supporter of the University of Buckingham, Britain's only private university. Granted university status in 1983, Mrs Margaret Thatcher was its Chancellor from 1993 to 1997. The law journal of the University of Buckingham, founded in 1986, was named after Lord Denning. http://www.buckingham.ac.uk/law/aboutdept/denning.html
[8] 1947 K.B. 130
[9] http://www.denninglawjournal.com/index_files/Page641.htm
[10] http://www.buckingham.ac.uk/law/aboutdept/denning.html
[11] The Denning Law Journal vol. 14 1999 included essays by Atiyah, P.S. on 'Lord Denning and Contract', Stevens, J. on Lord Denning's contribution to the development of the *Mareva* injunction, 'Equity's Manhattan Project', Forsyth, C. on Lord Denning's contribution to the development of Administrative Law, Freeman, M.D.A, on 'Family Justice and Family Values according to Lord Denning', Welstead, M. on 'The Deserted Bank and the Spousal Equity', a review of Lord Denning's attempt to create 'an abandoned wife's equity', 'The Role of the Judge in Public Inquiries' and Phang, A. on 'The Natural Law Foundation of Lord Denning's Thought and Work'.
[12] London 1993
[13] London 1997
[14] Modern Law Review, Vol. 54, No. 4 [July 1991] pp. 606-08
[15] Professor of English Law at the London School of Economics, 1959-1970; Professor of Public Law at the London School of Economics, 1970-1984
[16] London 1977
[17] Lord Denning himself was openly critical of Griffith's approach: 'The most politically influential of the judges however, has been the Master of the Rolls, Lord Denning…..with his own modest roots he dismisses the attacks on a class-based judiciary: 'The youngsters believe that we come from a narrow background – it's all nonsense – they get it from that man Griffith'. Sampson, A. *The Changing Anatomy of Britain* [London 1981] at p. 159 quoted in Griffith, J.A..G. op. cit p. 1
[18] Ibid p. 336
[19] Ibid p. 338
[20] Ibid p. 342
[21] Ibid p. 343
[22] Griffith, J.A.G., Review of *The Discipline of Law* by Lord Denning. Modern Law Review Vol. 42 No. 3 May 1979 pp. 348-50
[23] Ibid p. 342
[24] Robson, P. and Watchman, P. *Justice, Lord Denning and the Constitution* [Farnborough 1981].
[25] Ibid at vii. Quoted in a review of Robson, P. and Watchman, P. *Justice, Lord Denning and the Constitution* [Farnborough 1981] by Hutchinson, A.C. Supreme Court Law Review Vol 3 565 1982 at 568
[26] This section is based on the review of Robson, P. and Watchman, P. *Justice, Lord Denning and the Constitution* [Farnborough 1981] by Hutchinson, A.C. Supreme Court Law Review Vol 3 1982, pp. 565-72
[27] London 1984

[28] Oxford Journal of Legal Studies Vol. 5 No. 3 [Winter 1985] pp. 439-445
[29] PC, Lord of Appeal in Ordinary 1964-1982
[30] Denning, A. *Freedom under the Law* [London 1949]
[31] Lord Goff of Chievely, Lord of Appeal in Ordinary 1986-1998, retiring as Senior Law Lord in 1998. Lord Goff called on Lord Denning in Whitchurch on the occasion of his 100th birthday on 23rd January 1999.
[32] Lord Goff noted that, in the All Souls Prize Fellowship competition of 1922, the Fellows chose Cyril Radcliffe rather than Lord Denning. Radcliffe was a notable Law Lord, active in the 1950s and 1960s, much admired for his legal learning, who drew the lines on the map which partitioned India and Pakistan in 1947, an act which had the consequence, according to some calculations, of six million deaths. Lord Denning thereafter referred to All Souls as the 'college that refused me', claiming his lack of proficiency in Latin as the cause of his failure to win an All Souls Prize Fellowship. *The Family Story* [London 1981] pp. 38-39. In the 1920s and 1930s, All Souls was close to the heart of government, the City and the Law. Rowse, A.L. *All Souls and Appeasement* [London 1979] It was a college which could number amongst its fellows Prime Ministers, Governors of the Bank of England, judges of the Court of Appeal and the House of Lords, as well as philosophers, historians and eminent classical scholars such as Lionel Curtis, Lord Simon, A.L. Rowse, Sir Isaiah Berlin, John Sparrow, Sir William Haley and Lord Halifax.
[33] Lord Denning was a Lord of Appeal in Ordinary between 1957 and 1962
[34] *Rahimtoola v Nizam of Hyderabad* 1957 3 WLR 884
[35] *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* 1977 1 AllER 881
[36] *Central London Property Trust Ltd v High Trees House Ltd* 1947 KB 130
[37] *Candler v Crane Christmas & Co*. 1951 2 KB 164
[38] *R v Northumberland Compensation Appeal Tribunal: ex parte Shaw* 1952 1 KB 338; *Barnard v. National Dock Labour Board* 1953 2 QB 18 and his dissenting judgment in *Conway v Rimmer* 1968 AC 910
[39] *Seaford Court Estates, Ltd. v Asher* 1949 2 KB 481; *Magor and St. Mellons Rural District Council v Newport Corporation* 1950 2 AllER 1226
[40] *British Movietone News Ltd. v London District Cinemas* 1951 AC 166
[41] *National Provincial Bank v Ainsworth* 1965 AC 1175
[42] *The Siskina* 1977 3 AllER 803; *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara [Partamina] and Government of Indonesia [as interveners]* 1977 3 AllER 324; *Z Ltd v A* 1982 1 AllER 556 and *Third Chandris Shipping Corporation v Unimarine SA* 1979 2 AllER 972
[43] *HP Bulmer Ltd v J. Bollinger SA* 1974 2 AllER 1226
[44] *Nelson v Larholt* 1948 1 KB 339; *Larner v LCC* 1949 2 KB 683
[45] *The Guardian* March 6th 1999
[46] Sir Stephen Sedley practised at the Bar of England and Wales for 28 years, specialising in public law and discrimination law, before being appointed a judge of the High Court in 1992. He became a Lord Justice of Appeal in 1998, and has sat as an ad hoc judge of the European Court of Human Rights. He is an honorary

professor of law at Warwick and Cardiff Universities and has since 2000 been president of the British Institute of Human Rights.

[47] *The Case of the Tailors of Ipswich* 11 Co. Rep. 53

[48] 1974 1 WLR 185 at 192

[49] *Laker Airways Ltd. v Department of Trade* 1977 2 AllER 182

[50] *Schmidt v Secretary of State for Home Affairs* 1969 1 AllER 904

[51] *R v Secretary of State for the Home Department ex parte Hosenball* 1977 3 AllER 452

[52] *Report into the Circumstances Leading to the Resignation of the Former Secretary of State for War, Mr. J.D. Profumo* HMSO 1963 Cmnd. 2152

[53] *Hubbard v Pitt* 1976 Q.B. 142

[54] *HP Bulmer Ltd v J. Bollinger SA* 1974 2 AllER 1226

CHAPTER ONE

THE COMMON LAW TRADITION

In discussing the relationship between law and literary criticism Ronald Dworkin considered that the judge might be conceived as the author of law:

> We can usefully compare the judge deciding what the law is on some issue….with the literary critic teasing out the various dimensions of value in a complex play or poem. Judges, however, are authors as well as critics. A judge adds to the tradition he interprets; future judges confront a new tradition that includes what he has done. Of course literary criticism contributes to the traditions of art in which authors work; the character and importance of that contribution are themselves issues in critical theory. But the contribution of judges is more direct, and the distinction between author and interpreter more a matter of different aspects of the same process. We can find an even more fruitful comparison between literature and law, therefore, by constructing an artificial genre of literature that we might call the chain novel.[1]

The chain novel, as conceived by Dworkin, is a novel written *seriatim*, by a series of authors each of whom 'interprets the chapters he has been given in order to write a new chapter, which is then added to what' the next author receives. 'Each has the job of writing his chapter so as to make the novel being constructed the best it can be', the authors 'are expected to take their responsibilities of continuity…seriously; they aim jointly to create, so far as they can, a single unified novel that is the best it can be'.[2] The author must take up some view about the novel in progress…..he will aim to find layers and currents of meaning rather than a single exhaustive theme'.[3] As Paul Raffield put it in *Images and Cultures of Law in Early Modern England: Justice and Political Power, 1558-1660*:[4] 'New customs may emerge and evolve, but judges use their skills as storytellers to contribute to the seamless web of common law, from which meaning is to be teased by subsequent authors in the chain. It is improbable that judgment should follow the model of the syllogism: the application of the major premise, law, to the minor premise, facts. Judgment is more likely to

be based upon the choice of the most coherent, plausible narrative available'.[5] According to Robert Cover, 'No set of legal institutions or prescriptions exists apart from narratives that locate it and give it meaning. For every constitution there is an epic, for every Decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a set of rules to be observed, but a world in which to live'.[6]

Dworkin's conceit of the law as a 'chain novel' has an obvious relevance to a consideration of the English common law tradition as delineated in the writings of a series of authors such as Fortescue, Coke and Blackstone. It will be argued, by exploring the relationship between his jurisprudence and that of those whose writings defined this tradition, that Lord Denning was an eloquent and convincing proponent of a tradition of the common law which reaches back to the fifteenth century.

In a formal sense, the tradition of the common law expressed in the writings of Fortescue, Coke and Blackstone remains, as witnessed by virtually every current textbook of law, a constitutive aspect of the English legal order. However, it could be contended that the positivist approach to law set out in the writings of Thomas Hobbes - and followed closely in the jurisprudence of Bentham and Hart, to name two of the most influential protagonists of that school of legal theory, in particular as expressed in the will of a sovereign parliament - has to an increasing extent come to overshadow, indeed threaten, the dominance - even the continuance - of the common law tradition eloquently and convincingly espoused by Lord Denning. It is a commonplace of contemporary legal theory that the common law tradition, rooted in custom, history and the continuation of a mode of life and being from one generation to the next, has been challenged, if not quite displaced, by a jurisprudence which understands law to be a contingent device of human ingenuity, an invention whose inherent arbitrariness is mitigated, if at all, by its association with a sovereign who somehow embodies the 'will of the people' - or at least whose expression in legislation is legitimated, by dint of the contemporary culture of democracy, as the expression of some form of 'public opinion'. This chapter will demonstrate that although the common law tradition, as expressed in the jurisprudence of Lord Denning, may have changed in some of its detail and superficial patterning, it remained, in his understanding, like the *Argos* captained by Jason in his quest for the Golden Fleece, the same in name and inherent form as it was when articulated by Sir John Fortescue in the fifteenth century.

Lord Denning's understanding of the nature of the common law was founded on two principles: the supremacy of law over all other forms of